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MICHAEL RODAK, JR., CLERK

No. 77-507

In the
Supreme Court of the United States
OCTOBER TERM 1977

KARL BRUNO,

Petitioner,

vs.

HAYIM KALMICH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court is reported at 404 F.Supp. 57 (N.D.Ill. 1975).

The opinion of the Court of Appeals is reported at 553 F.2d 549 (7th Cir. 1977).

QUESTIONS PRESENTED

1. Whether the issue presented by the applicability of a Yugoslavian statute of limitations is the type of issue which this Court will hear.

2. Whether this Court will review a matter which basically involves the determination of state law by the Court of Appeals.
3. Whether this Court will review a judgment which is not final.
4. Whether this Court will review a question which was not argued, or ruled upon, in the Court of Appeals.
5. Whether the opinion of the Court of Appeals is consistent with established precedents.

STATUTES INVOLVED

Article 125 of the Yugoslavian Criminal Code

Whoever in violation of the rules of international law at the time of war, armed conflict or occupation, orders or executes willful killings, tortures or inhuman treatment of the civilian population, including therein biological experiments, causing great suffering or serious injury to body or health; unlawful deportation, transfers, forcible denationalization or conversion of the population to another faith; rape or compulsion to prostitution; use of measures of intimidation and terror, taking of hostages, collective penalties, unlawful taking to concentration camps and other unlawful confinements, deprivations of rights to a fair and impartial trial; compulsive enlistment in the armed forces of an enemy power, in its intelligence service or administration; coercion to compulsive labour; exposition of the population to starvation, confiscation of property, pillage, unlawful and arbitrary destruction or large-scale appropriation of property not justified by military needs, imposition of unlawful and disproportionately large contribution and requisitions, devaluations of domestic currency, or the unlawful issuance of currency, shall be punished by strict

imprisonment for not less than five years or by death penalty

Article 134(a) of the Yugoslavian Criminal Code

Criminal prosecution and enforcement of punishment for crimes provided for by Articles 124-128 of the present Code are not subject to the statute of limitation.

Sec. 1 of the Law Concerning the Treatment of Property Abandoned During the War or Property Taken Away From the Owners by the Enemy or its Helpers

All properties of physical persons and legal entities in the territory of the Federal People's Republic of Yugoslavia which had to be abandoned by their owners or holders during the occupation of the country; property taken away from such persons against their will by the occupying force and its helpers, with or without compensation, for racial, religious, national or political reasons; as well as property which under the pressure of the occupying force, by legal acts or otherwise, passed into the hands of third parties, shall be returned to the respective owners or tenants immediately, regardless of who holds their property and on what grounds, on the day when this Law becomes effective. (August 16, 1946).

Property shall not be considered abandoned if the absentee owner left an authorized agent. Citizens of the F. P. R. Y. residing abroad who were not registered with the representatives of the F. P. R. Y. in the state of their residence and who were not willing to comply with the request for their return home shall not be able to request the return of property through an authorized agent.

If property was destroyed, damaged or could not be found, the owner may bring action for damages

against responsible persons without losing the right to claim war damage.

Property, in the sense of the present Law, means especially real property, such as land, houses, agricultural farms, forests, industrial enterprises with all installations; (it also means) personal property, such as furniture, securities, jewelry, claims, shares and partnership interests, copyrights, rights of industrial property, shares with their inventories, and other rights in property.

Sec. 20 of the Yugoslavian Statute of Limitations

If the damage was caused by a criminal act, and a longer period of time was provided for the prosecution of a crime, then an action for the recovery of damages shall be barred when the time for the prosecution of the crime expires.

The stalling of the statute of limitation for the prosecution of a crime entails the stalling of the statute of limitation for a (civil) action to recover damages.

The same rule applies to an action for preventing the running of the statute of limitation.

STATEMENT OF THE CASE

The instant petition involves a diversity case instituted in the United States District Court for the Northern District of Illinois by Hayim Kalmich (respondent here), a citizen of Quebec, Canada, against Karl Bruno (petitioner here), a citizen of Illinois. Respondent's complaint alleges that petitioner, while serving with the General Plenipotentiary for the Economy in Serbia, an arm of the Nazi occupation forces in Yugoslavia during World War II, confiscated respondent's textile-importing business solely because respondent was of the Jewish faith. The complaint also alleges that, upon the defeat of the

Nazi occupation forces in Yugoslavia, petitioner fled that nation "for places unknown to the plaintiff" in order to avoid the consequences of his wrongdoing and that respondent located petitioner in Chicago, Illinois in 1972.

Respondent's complaint was filed on November 6, 1974. On October 14, 1975, the District Court dismissed the complaint. On April 25, 1977, the Court of Appeals for the Seventh Circuit reversed the dismissal order and remanded the matter for further proceedings. Respondent's petition for rehearing was denied on June 28, 1977, and the mandate of the Court of Appeals issued on July 12, 1977.

ARGUMENT

I

THE ISSUE PRESENTED BY THE APPLICABILITY OF A YUGOSLAVIAN STATUTE OF LIMITATION IS NOT THE TYPE OF ISSUE WHICH THIS COURT WILL HEAR.

The opinion of the Court of Appeals concluded that Article 134(a) of the Yugoslavian Criminal Code and Sec. 20 of the Yugoslavian statute of limitations were "specifically directed" to the cause of action to warrant their application in Illinois, as required by *Davis v. Mills*, 194 U.S. 451, 454 (1904).

Respondent respectfully suggests that an issue involving the applicability of a Yugoslavian statute of limitations is not the type of matter which this Court will hear. The writ of certiorari is granted "only in cases of peculiar gravity and general importance". *Hamilton-Brown Shoe Co. v. Wolf Bros. and Co.*, 240 U.S. 251, 258 (1916). The instant case does not meet this standard.

II

THIS COURT WILL NOT REVIEW A MATTER WHICH BASICALLY INVOLVES THE DETERMINATION OF STATE LAW BY THE COURT OF APPEALS.

Petitioner has raised three points which, in his opinion, merit review by this Court: (1) that the Court of Appeals' conclusion that the Yugoslavian limitation provisions are "specifically directed" to the cause of action to warrant their application in Illinois is inconsistent with this Court's opinion in *Davis v. Mills*, *supra*, 194

U.S. 451, 454 (1904); (2) that other provisions of the Yugoslavian statute of limitations should be applied (Pet., P. 10); and (3) the foreign cause of action cannot be enforced in Illinois as it constitutes a penal statute.

These points do not merit review by this Court as they all involve questions of interpretation and application of state law by the Court of Appeals. As this is a diversity case, the Court of Appeals sat as "another court" of Illinois. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945). This Court will "ordinarily accept the determination of local law by the Court of Appeals". *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 462 (1967).

Petitioner's contention that the foreign cause of action cannot be enforced in Illinois as it constitutes a penal statute was rejected by the District Court (404 F.Supp. at 61-63 (App. 4a-7a)) and by the Court of Appeals (553 F.2d at 552 (App. 23a)). Therefore, this contention will not be reviewed here. This Court will accept the "interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state law issue without such guidance might have justified a different conclusion". *Bishop v. Wood*, 426 U.S. 341, 346 (1976). Such determinations below "generally render unnecessary review of their decisions in this respect". *Cort v. Ash*, 422 U.S. 66, 73 (fn. 6) (1975).

III

THIS COURT WILL NOT REVIEW A JUDGMENT WHICH IS NOT FINAL.

The judgment of the Court of Appeals reversed the order of the District Court which dismissed respondent's

complaint and remanded the matter for further proceedings. Therefore, it did not finally dispose of the case: a judgment of a Court of Appeals which reverses a decision of the District Court and remands the matter for further proceedings is not "final". *Slaker v. O'Connor*, 278 U.S. 188, 189 (1929). This Court prefers to review only judgments which finally dispose of a matter. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1975).

IV

THIS COURT WILL NOT REVIEW A QUESTION WHICH WAS NOT ARGUED, OR RULED UPON, IN THE COURT OF APPEALS.

Petitioner's contention (Pet., P. 10) that other sections of the Yugoslavian statute of limitations are applicable here was not argued, or ruled upon, in the Court of Appeals.* Therefore, this point will not be reviewed here. This Court will not consider contentions which were not raised or considered in the Court of Appeals. *Adickes v. Kress and Co.*, 398 U.S. 144, 147 (fn. 2) (1970).

V

THE OPINION OF THE COURT OF APPEALS IS CONSISTENT WITH ESTABLISHED PRECEDENTS.

The Court of Appeals' conclusion that Article 134(a) of the Yugoslavian Criminal Code and Sec. 20 of the Yugoslavian statute of limitations is "specifically di-

* This point was raised for the first time in the Court of Appeals in the petition for rehearing. However, a petition for rehearing cannot be used to present issues which were not raised in the appeal-in-chief. *Kelly v. Dunne*, 344 F.2d 129, 135 (1st Cir. 1965); *Partenweederei MS Belgano v. Weigel*, 313 F.2d 423, 424 (9th Cir. 1962); *Minute Maid Corp. v. United Foods, Inc.*, 291 F.2d 577, 585-586 (5th Cir. 1961).

rected" to the cause of action is consistent with the opinions in *Maki v. George R. Cooke Co.*, 124 F.2d 663 (6th Cir. 1942), cert. den., 316 U.S. 686, and *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152 (2d Cir. 1955).

In *Maki*, the Court of Appeals for the Sixth Circuit held that the requirement of specificity, as enunciated in *Davis v. Mills*, *supra*, 194 U.S. 451, 454 (1904), was satisfied by a limitation provision which applied to all statutory causes of action. 124 F.2d at 666. Citing *Maki*, the Court of Appeals for the Second Circuit held in *Bournias*:

(T)he test of "specificity" was found satisfied by a separate statute imposing a limitation on all statutory rights. 220 F.2d at 155.

Therefore, accepting petitioner's contention (Petition, P. 12) that Sec. 20 of the Yugoslavian statute of limitations is "applicable to *any* civil cause of action which occurred as a result of criminal acts", it is clear that the Court of Appeals properly concluded that the Yugoslavian limitation provisions were "specifically directed" to the cause of action.

Respondent's contention that the foreign cause of action cannot be enforced in Illinois as it constitutes a penal statute is also inconsistent with established precedents. Primarily, as this is an action by a private individual, with damages accruing to his own personal benefit, it cannot properly be argued that enforcement of a foreign penal statute is sought. See *Huntington v. Attrill*, 146 U.S. 657, 666-667, 668, 673-674 (1892). Furthermore, a foreign criminal statute which also provides a civil cause of action is not a penal statute. See *Evey v. Mexican Central Ry. Co.*, 81 F. 294, 297-298, 306 (5th Cir. 1897), cert. den., 167 U.S. 746.

CONCLUSION

For the foregoing reasons, respondent respectfully requests this honorable Court to deny the petition for the writ of certiorari.

Respectfully submitted,

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